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IN THE

Supreme Court of the United States

October Term, 1977

No. 76-1787

CHARLES L. LEVY,

Petitioner,

vs.

IRVING J. COHEN, JACK MOSHEIN and HARRY A. ZIDE,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of California.

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Respondents.

Petition for a Writ of Certiorari to the Supreme Court of California.

Introduction.

Petitioner prays that a writ of certiorari issue to review the Judgment of the Supreme Court of California entered on March 17, 1977.

Opinion Below.

The opinion of the Supreme Court of California is printed in Appendix A hereto and is reported at 19 Cal.3d 165.

Jurisdiction.

The Judgment, printed in Appendix A hereto, which is sought to be reviewed is dated and was entered March 17, 1977.

The jurisdiction of this Court is involved under Section 1257(3) of Title 28 of the United States Code.

Questions Presented.

1. Whether an Order Confirming Plan of Arrangement entered by the Bankruptcy Court in a Chapter XII proceeding of a Partnership Debtor which discharges general partners from personal liability for partnership debts in contravention of the mandate of Section 5j of the Federal Bankruptcy Act, shall have the effect of *res judicata* under the circumstances presented in this case?

2. Whether the *in rem* nature of a Chapter XII Proceeding makes an unsecured creditor of a Partnership Debtor a "Party to the Proceeding" for purposes of according a *res judicata* effect to a determination made by the Bankruptcy Court on a collateral matter not involving the Debtor in the Chapter XII Proceeding?

3. May a Bankruptcy Court discharge a general partner from personal liability for partnership debts when the personal assets, property and estate of the general partner have not been brought within the jurisdiction of the Bankruptcy Court in a Chapter XII Proceeding of the Partnership Debtor, or administered in a separate proceeding in bankruptcy?

4. In a Chapter XII Proceeding of a Partnership Debtor, may the Bankruptcy Court, consistent with the requirements of due process of law under the Fifth Amendment, discharge general partners from personal liability for partnership debts on the basis of notice given to creditors in the Chapter XII Proceeding that Confirmation of a Plan of Arrangement proposed by the Partnership Debtor shall be deemed a complete release of any and all claims provable under

the provisions of the Bankruptcy Act against the general partners?

5. Whether an unsecured creditor of a Partnership Debtor in a Chapter XII Proceeding under the Federal Bankruptcy Act, who has commenced an action under State law to enforce the personal liability of general partners for partnership debts, must participate in the Chapter XII Proceeding of the Partnership Debtor or suffer the bar of *res judicata* if the Bankruptcy Court exceeds its jurisdiction by discharging individual general partners from partnership debts?

Constitutional Provisions and Statutes Involved.

Section 5j of the Bankruptcy Act, 11 U.S.C. §23j:

> "The discharge of a partnership shall not discharge the individual general partners thereof from the partnership debts. A general partner adjudged a bankrupt either in a joint or separate proceeding may, pursuant to the provisions of this Act, obtain a discharge from both his partnership and individual debts."

Section 406 of the Bankruptcy Act, 11 U.S.C. §806:

> "For the purposes of this chapter, unless inconsistent with the context—
>
> (2) 'claims' shall include all claims of whatever character, against a debtor or his property, whether or not such claims are provable under section 63 of this Act and whether secured or unsecured, liquidated or unliquidated, fixed or contingent;
>
> (6) 'debtor' shall mean a person, other than a corporation as defined in this Act, who could become a bankrupt under section 4 of this Act,

who files a petition under this chapter and who is the legal or equitable owner of real property or a chattel real which is security for any debt, but shall not include a person whose only interest in property proposed to be dealt with by the arrangement is a right to redeem such property from a sale had before the filing of such petition;"

Section 411 of the Bankruptcy Act, 11 U.S.C. §811:

"Where not inconsistent with the provisions of this chapter, the court in which the petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and his property, wherever located."

Section 473(1) of the Bankruptcy Act, 11 U.S.C. §873(1):

"Upon confirmation of an arrangement—

(1) the arrangement and its provisions shall be binding upon the debtor, upon any person issuing securities or acquiring property under the arrangement, and upon all creditors of the debtor, whether or not they are affected by the arrangement or have accepted it or have filed their claims, and whether or not their claims have been scheduled or allowed and are allowable."

Section 476 of the Bankruptcy Act, 11 U.S.C. §876:

"The confirmation of an arrangement shall discharge a debtor from his debts and liabilities provided for by the arrangement, except as provided in the arrangement or the order confirming the arrangement, excluding such debts as are not dischargeable under section 17 of this Act."

Fifth Amendment to the Consitution of the United States:

"No person shall be . . . deprived of life, liberty or property without due process of law."

Statement of the Case.

Preliminary Statement.

Action by Charles L. Levy against Irving J. Cohen, Jack Moshein and Harry A. Zide (hereafter sometimes referred to collectively as the "General Partners" or Respondents) to recover the balance due on promissory notes delivered to Petitioner by Beverly Crest Convalescent Hospital, a California limited partnership (hereafter sometimes referred to as the "Partnership Entity" or the "Partnership"). The action was filed on December 11, 1972 in the Superior Court of California, County of Los Angeles and arose under state law to enforce the personal liability of General Partners for debts of the Partnership Entity owed to Petitioner.

Prior to the commencement of Petitioner's state court action against the General Partners, on October 30, 1970, the Partnership Entity, as Debtor, filed a proceeding for a real property arrangement under Chapter XII of the Federal Bankruptcy Act. On May 15, 1973 a proposed Plan of Arrangement was filed in the Chapter Proceeding. On July 3, 1973 an Order Confirming Plan of Arrangement (herein the "Confirmation Order") was filed. Petitioner, a general unsecured creditor of the Partnership Debtor, did not participate as a creditor in the Chapter XII Proceeding. No appeal was taken from the Confirmation Order which became final on July 10, 1973 (Section 39c of the Bankruptcy Act, 11 U.S.C. §67c).

On July 31, 1974 Respondent Cohen filed a Supplement to Answer to Complaint in the state court action pleading, as an affirmative defense, a release and discharge from personal liability for Partnership debts under the Confirmation Order entered July 3, 1973 in the Chapter XII Proceeding which provided that Respondents, as General Partners, were released from all debts, liabilities and obligations incurred by them on behalf of the Partnership Entity.

Following a nonjury trial in the state court action, Findings of Fact and Conclusions of Law were filed on July 23, 1975 and judgment was entered on July 24, 1975 in favor of Petitioner and against Respondents in the sum of $25,000 together with interest and attorneys' fees, for a total $37,567.11.[1]

To review a judgment of the Supreme Court of California entered on March 17, 1977, adopting the decision of the Court of Appeal of the State of California, Second Appellate District, Division Four, which reversed the judgment of the trial court in favor of Petitioner on the sole ground that the Confirmation Order entered in the Chapter XII Proceeding of the Partnership Debtor, which released and discharged the General Partners from personal liability for debts of the Partnership Entity, was *res judicata* on the issue of Respondents' liability on the promissory notes.

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[1]Petitioner's action against the General Partners was based upon amounts due under two promissory notes (First Cause of Action) and for unpaid amounts due under an employment agreement with the Partnership Entity (Second Cause of Action). Respondent Cohen filed a cross-complaint against Petitioner for money. Judgment was entered in favor of Respondent Cohen and against Petitioner for $6,540.58 on the cross-complaint. Judgment was entered in favor of Respondents on the Second Cause of Action. Petitioner did not file a cross-appeal from either portion of the judgment.

Additional facts material to the consideration of the questions presented are recited under the headings "Bankruptcy Proceeding" and "State Court Action".

Bankruptcy Proceeding.

The Partnership Entity was formed on December 31, 1965 and at all times subsequent to that date, Respondents Cohen and Moshein have been general partners. Since November-December 1968, Respondent Zide has been a general partner. On December 20, 1967, Petitioner became a limited partner of the Partnership Entity.

On January 23, 1968 and on February 2, 1968 Petitioner made loans to the Partnership Entity, each in the principal amount of $15,000, for total loans of $30,000. Each loan was evidenced by a 30-day promissory note, each note was payable to the order of Charles L. or Florence Levy, each note bore 7% interest per annum, and each note was executed on behalf of the Partnership Entity by Respondent Cohen. The $30,000 loaned by Petitioner to the Partnership Entity was borrowed by Petitioner from Bank of America. Petitioner pledged collateral valued at $47,000 to secure the Bank of America loans, which collateral was foreclosed upon by the Bank in November, 1970.

Subsequent to December 31, 1968 Respondent Cohen, on behalf of the Partnership Entity, delivered two promissory notes to Petitioner. One note, incorrectly dated January 23, 1968, was in the principal amount of $15,000. The second note, incorrectly dated February 2, 1968, was in the principal amount of $10,000. The two notes each name Petitioner only as payee, are each payable two years from date, are each executed on behalf of the Partnership Entity by Respondents

Cohen and Moshein, and each bore 8¼% interest per annum. (The two notes, in the aggregate principal amount of $25,000, were the subject of Petitioner's First Cause of Action in the state court action).

On September 9, 1970 a written demand for payment of all debts which the Partnership Entity owed to Petitioner was mailed to Respondents and each received a copy of the demand.

The Partnership Entity opened its convalescent hospital in March 1970, and after operating for approximately six months a state court receiver was appointed.

On October 30, 1970 a proceeding for a real property arrangement under Chapter XII of the Federal Bankruptcy Act (11 U.S.C. §801, *et seq.*) was filed on behalf of the Partnership Entity, as Debtor, in the U.S. District Court, Central District of California. Respondents, as General Partners of the Partnership Entity, signed the Petition initiating the Chapter XII Proceeding and Schedule A-3 to the Petition. Petitioner was listed on Schedule A-3 as an unsecured creditor in the amount of $25,000. The exclusive subject matter of the Chapter XII Proceeding was the property, debts and liabilities of the Partnership Entity, as Debtor. Respondents, the General Partners of the Partnership Entity, were not the "Debtor" in the Chapter XII Proceeding (Section 406(6) of the Bankruptcy Act, 11 U.S.C. §806(6)). At no time were the personal assets, properties and estates of Respondents subject to the jurisdiction of or administration by the Bankruptcy Court in either the Chapter XII Proceeding of the Partnership Entity, as Debtor, or any separate proceeding in bankruptcy.

On November 2, 1970, the Bankruptcy Court, in furtherance of its "exclusive jurisdiction of the Debtor

and [its] property, wherever located" (§411 of the Bankruptcy Act, 11 U.S.C. §811) entered an Order Staying Suits against the Partnership Entity.

On May 15, 1973, a Plan of Arrangement was filed in the Bankruptcy Court. The Plan, as proposed by the Partnership Entity, as Debtor, provided, in pertinent part:

> "Confirmation of the Plan of Arrangement shall be deemed a full and complete release and settlement in full of ANY AND ALL CLAIMS PROVABLE UNDER THE PROVISIONS OF THE BANKRUPTCY ACT against the [Partnership Entity] and [the Respondents]" (emphasis added).

On May 25, 1973, the Clerk of the Bankruptcy Court mailed notice to creditors of the Partnership Entity in the Chapter XII Proceeding, that a meeting to consider the Proposed Plan would be held on June 26, 1973 in Bankruptcy Court.[2]

On July 3, 1973 an Order Confirming Plan of Arrangement (the "Confirmation Order") was entered and filed in the Bankruptcy Court. With respect to the Partnership Entity, as Debtor, in the Chapter XII

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[2]The Chapter XII Proceeding of the Partnership Entity, as Debtor, had been consolidated for administrative purposes in the Bankruptcy Court, with a proceeding for an Arrangement under Chapter XI of the Federal Bankruptcy Act (11 U.S.C., §701), *et seq.*) filed on the same date, in the same court, by Beverly Crest Convalescent Hospital, a California corporation, as Debtor. The Bankruptcy Court had appointed a single Receiver-Trustee to operate the Partnership and Corporate Debtors in the consolidated proceeding. The Plan of Arrangement was proposed on behalf of the Partnership Entity and Corporate Entity as Debtors in the consolidated proceeding and a single Order Confirming Plan of Arrangement was filed in the consolidated proceeding.

Proceeding, the Order provided (Paragraph 9), in pertinent part:

> "Upon entry of this Order, the [Respondents] are released and discharged from any and all debts, liabilities and obligations whatsoever incurred in connection with the operation, construction or maintenance of the business, properties and assets of the [Partnership Entity, Debtor herein] as well as from the conduct of the business operations and activities of [said Partnership Entity, Debtor], and the Order shall be and constitute a defense to the assertion of any such claims and evidence of the discharge thereof . . ."

Petitioner filed a Proof of Claim in the Chapter XII Proceeding in the amount of $38,505.89. The Proof of Claim stated "that by filing this Claim [Claimant] does not waive any rights, claims, actions, etc. he may have as against the partners individually." The attorneys for the Debtor and the Receiver in the Chapter XII Proceeding rejected Petitioner's Proof of Claim on the grounds that it was late filed and barred (11 U.S.C. §851).

Petitioner did not attend the meeting of creditors held in the Chapter XII Proceeding on June 26, 1973. The Confirmation Order entered on July 3, 1973 by the Bankruptcy Court in the Chapter XII Proceeding of the Partnership Entity, as Debtor, became final on July 13, 1973 (11 U.S.C. §67c). Petitioner was not notified of the provision in the Confirmation Order that released and discharged the General Partners from personal liability for debts of the Partnership Entity until the provision was alleged as an affirmative defense in the Supplement to Answer to Complaint filed in the state court action on July 31, 1974.

State Court Action.

On December 11, 1972, Petitioner, a general unsecured creditor of the Partnership Entity, commenced the state court action against Respondents pursuant to California Code of Civil Procedure §388(b). The subject matter of the state court action was the personal liability of Respondents, as General Partners of the Partnership Entity, under California Corporations Code §§15509 and 15015, for the debts of the Partnership Entity owed to Petitioner.

By virtue of the Order Staying Suits against the Partnership Entity entered in the Chapter XII Proceeding on November 2, 1970, the Partnership Entity was not served with process in the state court action. A joint Answer to Complaint was filed by Respondents Moshein and Zide and on behalf of the Partnership Entity. A separate Answer to Complaint was filed by Respondent Cohen. On February 6, 1973, Petitioner filed an At-Issue Memorandum in the state court action under Rule 206, California Rules of Court.

On July 31, 1974 Respondent Cohen filed a Supplement to Answer to Complaint pleading as a bar to Petitioner's action a discharge from personal liability for Partnership debts granted by the Bankruptcy Court in the Confirmation Order entered on July 3, 1973 in the Chapter XII Proceeding.

A nonjury trial commenced on April 9, 1975 and proceeded for three court days. From the evidence adduced at trial, the lower court made the following pertinent Findings of Fact:

(35) At the time the Chapter XII Proceeding was filed, Plaintiff ["Petitioner"] was an unsecured creditor of BCCH ["Partnership Entity" or the "Partnership"]

for the balance due on the promissory notes received in evidence herein as Exhibits "1" and "2".

(39) The Debtor in the Chapter XII Proceeding was the Partnership Entity. Defendants, COHEN, MOSHEIN and ZIDE, and each of them ["Respondents"], were not a debtor in the Chapter XII Proceeding.

(40) At the time the Chapter XII Proceeding was filed, and at all times subsequent thereto, Respondents, as General Partners of the Partnership, were jointly and personally liable to Petitioner for the debts and obligations of the Partnership owed to Petitioner.

(41) A Plan of Arrangement was filed on May 15, 1973 in the Consolidated Proceeding [see footnote 2 to this Petition] and received in evidence herein as Exhibit "H".

(42) The indebtedness of the Partnership Entity owed to Petitioner as of the filing of the Chapter XII Proceeding was a claim provable against the Partnership Entity in the Consolidated Proceeding. Petitioner's Proof of Claim filed in the Chapter XII Proceeding was late filed. Petitioner shall not receive any distribution or dividend in the Consolidated Proceeding on account of the indebtedness of the Partnership Entity owed to Petitioner as of the filing of the Chapter XII Proceeding.

(43) The joint and personal liability of Respondents, and each of them, as General Partners of the Partnership, for the debts and obligations of the Partnership owed to Petitioner was not litigated in the Consolidated Proceeding.

(45) That the records of the said Bankruptcy Court showed that a meeting of creditors was held before

John E. Bergener, Bankruptcy Judge, on June 26, 1973 to consider the Plan of Arrangement filed in the Consolidated Proceeding on May 15, 1973; that notice of such meeting was mailed to all creditors. [(No. 44—as they appear in the list of creditors of the said Debtor or as afterwards filed by creditors)] by the Court Clerk on May 25, 1973.

(46) An Order Confirming Plan of Arrangement ["Confirmation Order"] was filed on July 3, 1973, in the Consolidated Proceeding [and] was received in evidence herein as Exhibit "D".

(48) For purposes of the matters at issue in this action, the record upon which the Confirmation Order is based is the Plan of Arrangement filed on May 15, 1973 in the Consolidated Proceeding.

(49) The Confirmation Order filed on July 3, 1973 in the Consolidated Proceeding discharged the Debtor, the Partnership Entity, from all debts and liabilities owed to Petitioner.

(50) The Confirmation Order filed on July 3, 1973 in the Consolidated Proceeding, insofar as said Order purports to release and discharge Respondents as General Partners of the Partnership, from said Respondents' joint and personal liability to Petitioner for the debts and obligations of the Partnership owed to Petitioner at the time of filing the Chapter XII Proceeding, is broader than the record upon which said Order is based.

(52) At no time did Petitioner agree that Respondents, as General Partners of the Partnership, would not be individually and personally liable to Petitioner for payment of the promissory notes received in evidence herein as Exhibits "1" and "2".

From the foregoing Findings of Fact, the trial court made the following pertinent Conclusions of Law:

(1) Each of the promissory notes is a valid and binding obligation of Respondents, as General Partners of the Partnership Entity, and said Respondents are jointly and personally liable to Petitioner for payment of the balance due, owing and unpaid on said notes in accordance with the terms of said notes.

(2) The Bankruptcy Court in the Consolidated Proceeding did not have jurisdiction over Petitioner with respect to Petitioner's claim against Respondents, as General Partners of the Partnership Entity, to enforce said Respondents' personal liability for the debts and obligations of the Partnership owed to Petitioner.

(4) The claim of Petitioner to enforce the joint and personal liability of Respondents, as General Partners of the Partnership Entity, for the debts and obligations of the Partnership owed to Petitioner as of the filing of the Chapter XII Proceeding was not a claim provable in the Consolidated Proceeding [and No. (5)] was not a claim provable under the provisions of the Bankruptcy Act in the Consolidated Proceeding.

(6) Any language in Paragraph 9 of the Confirmation Order filed on July 3, 1973 in the Consolidated Proceeding which purports to release and discharge Respondents, as General Partners of the Partnership Entity, from their joint and personal liability for the debts and obligations of the Partnership owed to Petitioner, is regarded as surplusage and without effect.

(7) For purposes of the matters at issue in this action only, the Confirmation Order filed on July 3, 1973 in the Consolidated Proceeding is deemed without *res judicata* effect.

REASONS FOR ALLOWANCE OF THE WRIT.

In reversing the trial court judgment in favor of Petitioner, the Supreme Court of California, adopting the opinion of the Court of Appeal of the State of California, concluded that each of the three requirements for application of *res judicata*—(1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party to or in privity with a party to the prior adjudication?—as formulated in *Bernhard v. Bank of America,* 19 Cal.2d 807, 813 (1942), and approved by this Court in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313, 323-324, 91 S.Ct. 1434, 1440 (1971), "is met" in the present case.

Emphasizing the fact that "on May 25, 1973, plaintiff, as an unsecured creditor of the limited partnership, was given notice of the meeting of creditors (held June 26, 1973) which resulted in the order confirming plan of arrangement", and citing *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371, 60 S.Ct. 317 (1940), the Supreme Court of California concluded that since Petitioner had an opportunity in the Chapter XII Proceeding of the Partnership Debtor to raise and litigate the question of Respondents' personal liability for the debts and obligations of the Partnership Entity owed to Petitioner and to raise an objection that the Bankruptcy Court lacked jurisdiction (§5(j) of the Bankruptcy Act, 11 U.S.C. §23) to discharge respondents from personal liability for the debts of the Partnership Entity, the Confirmation Order "is conclusive in the present action insofar as

such order determined that defendants are not liable for obligations of the limited partnership."

The conclusions reached by the Supreme Court of California under the circumstances presented in this case are premised upon critical misconceptions concerning the competency of a Bankruptcy Court in a Chapter XII Proceeding involving a Partnership Entity, as Debtor, to conclusively determine collateral matters that are not within the scope of or necessarily related to the subject matter of a Chapter XII Proceeding. The opinion of the Supreme Court of California conflicts with the standards formulated in the opinions of this Court for application of *res judicata* or principles of collateral estoppel. The opinion of the Supreme Court of California raises serious questions concerning: (1) the rights and duties of general unsecured creditors of a Partnership Debtor in a Chapter XII Proceeding; (2) the status and capacity of General Partners of a Partnership Debtor in a Chapter XII Proceeding vis-a-vis unsecured creditors of the Partnership Entity; (3) the administration of a Chapter XII Proceeding in the Bankruptcy Court; and (4) the uniform application of the Federal Bankrupcy Law enacted by Congress. Each of the points alluded to herein, are amplified in the following arguments.

1. The Bankruptcy Court in the Chapter XII Proceeding of the Partnership Debtor did not have the power to discharge the individual General Partners from personal liability for partnership debts.

First National Bank of Herkimer v. Poland Union, 109 F.2d 54 (CA 2, 1940), Cert. denied, 309 U.S. 682, 60 S.Ct. 723 (1940);

Acme Tool, Inc. v. Flesher, 309 F.2d 636, 637 (CA 10, 1962).

Section 5j of the Bankruptcy Act was part of the Chandler Act Amendments to the Bankruptcy Act effective on September 22, 1938. Section 5j of the Bankruptcy Act is a clear and precise pronouncement by Congress on the question this court "was not called upon to determine" in *Myers v. International Trust Company,* 273 U.S. 380, 382, 47 S.Ct. 372 (1927). Section 5j of the Bankruptcy Act is an immunity that Congress, acting through its specifically granted exclusive federal power (U.S. Const. Art. I, §8, Cl. 4), has chosen to confer upon creditors of a Partnership Entity in a proceeding in bankruptcy.

By virtue of the entity theory of partnership bankruptcies adopted by Congress (*Liberty National Bank of Roanoke v. Bear,* 276 U.S. 215, 220-221, 48 S.Ct. 252, 254 (1928)) in a proceeding under the Federal Bankruptcy Act involving the partnership entity, only, as a bankrupt or debtor, the Bankruptcy Court "cannot prevent the partnership creditors from obtaining in an appropriate forum *in personam* judgments against the individual partners on unpaid partnership debts (*In Re Jercyn Dress Shop,* 516 F.2d 864, 867 (CA 2, 1975).

Bankruptcy Courts are courts of limited jurisdiction, possessing only such jurisdiction and powers as are conferred on them by statute (*Straton v. New,* 283 U.S. 318, 51 S.Ct. 465, 466 (1931); 9 *Collier on Bankruptcy,* ¶3.01 at 789 (14th ed.). The jurisdiction and power statutorily conferred upon a Bankruptcy Court in a Chapter XII proceeding relates exclusively to "the debtor and [its] property, wherever located." (§411 of the Bankruptcy Act, 11 U.S.C. §811).

2. The distinction between the Partnership Entity as Debtor, in the Chapter XII Proceeding, and the

General Partners who were neither debtors nor bankrupts in any proceeding under the Federal Bankruptcy Act is of critical significance in deciding the questions presented in this case and, equally important, in establishing the principles applicable in any proceeding in bankruptcy involving only the partnership entity, as debtor or bankrupt.

As defined in §406(6) of the Bankruptcy Act (11 U.S.C. §806), only the Partnership Entity was the "DEBTOR" in the Chapter XII Proceeding. The status of the Partnership Entity, as Debtor, in the Chapter XII Proceeding defines and limits the subject matter jurisdiction and competency of the Bankruptcy Court in each of the following particulars:

(a) The Bankruptcy Court, in furtherance of its "exclusive jurisdiction of the Debtor and [its] property, wherever located" (11 U.S.C. §811) could enter an Order Staying Suits against the Partnership Entity. Since the subject matter of the state court action concerned the individual liability and personal assets and properties of the General Partners who were not debtors in the Chapter XII Proceeding, the Bankruptcy Court could not enjoin Petitioner from commencing or prosecuting the state court action against the General Partners (*In Re Jercyn Dress Shop, supra; Chaplin v. Marine Midland Grace Trust Co. of New York,* 439 F.2d 118, 120-121 (CA 2, 1971); *In Re Magnus Harmonica Corp.,* 233 F.2d 804, 805 (CA 3, 1956); *In Re Diversey Bldg. Corp.,* 82 F.2d 458, 460 (CA 7, 1936); *In Re Nine North Church Street, Inc.,* 82 F.2d 186, 188-189 (CA 2, 1936)).

(b) As defined in §406(2) of the Bankruptcy Act (11 U.S.C. §806(2)) the only claims provable under

the provisions of the Bankruptcy Act in the Chapter XII proceeding were "all claims of whatever character, AGAINST A DEBTOR OR [ITS] PROPERTY." Under §406(2), as a matter of law, there were no claims provable under the provisions of the Bankruptcy Act against Respondents in the Chapter XII Proceeding. In substance and legal effect, the Proposed Plan of Arrangement submitted to creditors of the Partnership Entity and the notice of meeting of creditors to consider the Proposed Plan simply apprised Petitioner and all other creditors of the Partnership Debtor, in conformity with §5j of the Bankruptcy Act that upon confirmation of the Plan of Arrangement, Respondents, as individual General Partners of the Partnership Entity, "shall not" be discharged from liability for partnership debts.

(c) The *in rem* nature of a Chapter XII Proceeding is restricted to matters concerning the DEBTOR and the CREDITORS OF THE DEBTOR and does not embrace collateral matters that are not within the subject matter jurisdiction of the Bankruptcy Court.

(1) The *in rem* nature of the Chapter XII Proceeding related exclusively to the status of the Partnership Entity, as Debtor (*Abendroth v Van Dolsen,* 131 U.S. 66, 71, 9 S.Ct. 619, 621, (1889); *Manson v. Williams,* 213 U.S. 453, 455, 29 S.Ct. 519, 520 (1909); *Gratiot County State Bank v. Johnson,* 249 U.S. 246, 39 S.Ct. 263 (1919); *Myers v. International Trust Co.,* 263 U.S. 64, 73, 44 S.Ct. 86 (1923)).

(2) Under §473(1) of the Bankruptcy Act (11 U.S.C. §873), an order confirming a plan of arrangement in a Chapter XII proceeding "is a judgment *in rem*" (9 *Collier on Bankruptcy,*

¶9.80 at 1148). The scope of the binding effect of the judgment *in rem* aspect of the Confirmation Order entered in the Chapter XII Proceeding was statutorily confined by the express language of §473(1) to the "DEBTOR" and "ALL CREDITORS OF THE DEBTOR".

(3) Under §476 of the Bankruptcy Act (11 U.S.C. §876) "the confirmation of an arrangement SHALL DISCHARGE a DEBTOR from all his unsecured debts and liabilities". The discharge between the Debtor and all creditors of the debtor "results by operation of law from the confirmation of the plan". (9 *Collier on Bankruptcy,* ¶9.13 at 1154-55).

(4) Petitioner was a "Party to the Chapter XII Proceeding" with respect to the status of the Partnership Entity, as Debtor, and for purposes of discharging the Partnership Debtor from all debts and liability owed to Petitioner, as an unsecured "creditor of the Debtor".

(5) Respondents' participation in the Chapter XII Proceeding was in a representative capacity as General Partners of the Partnership Debtor. The individual liability of the General Partners for Partnership debts was an irrelevant, immaterial and necessarily collateral matter in the Chapter XII Proceeding of the Partnership Debtor.

(6) When no subject matter jurisdiction exists in the Bankruptcy Court it cannot be conferred by consent of the parties. (*In Re Moore,* 288 F.Supp. 887 [C.D. Cal. 1968]).

(7) Matters relating to the personal liability of Respondents for Partnership debts owed to

Petitioner that were at issue and pending in the state court action were not litigated in the Chapter XII Proceeding (see Finding of Fact No. 43, *supra*). Respondents and Petitioner were not adversaries in the Chapter XII Proceeding. There was no "actual controversy" in the Chapter XII Proceeding where the question of the Bankruptcy Court's subject matter jurisdiction "was raised and determined adversely to Respondent[s or Petitioner]". *Stoll v. Gottlieb,* 305 U.S. 165, 177, 59 S.Ct. 134, 140 (1938), is not applicable under the circumstances presented in this case.

(8) In *Chicot County Drainage District v. Baxter State Bank, supra,* this Court considered the *res judicata* effect to be given to a decree confirming a plan of composition entered by a Bankruptcy Court in a proceeding under former Chapter IX of the Bankruptcy Act providing for Municipal-Debt Readjustments. In *Chicot* the object of the Chapter IX Proceeding was to effect a plan of readjustment of the indebtedness of the District, as Debtor. The Bankruptcy Court had subject matter jurisdiction to determine issues relating to the District, as Debtor, its property and its indebtedness owed to creditors, including bondholders. In *Chicot,* the parties to the Chapter IX Proceeding were the District, as Debtor, and creditors of the District, the bondholders—the parties in the subsequent action were certain of the bondholders and the District. This Court's opinion in *Chicot* is cited for the proposition that a determination of relevant questions involving the DEBTOR and CREDITORS OF THE DEBTOR arising within the subject matter jurisdiction of the Bank-

ruptcy Court in a Chapter proceeding, while open to direct review, are not subject to collateral attack. Under the circumstances presented in this case, *Chicot* is not determinative of the questions sought to be reviewed.

The "clear and unmistakable policy of the Bankruptcy Act" is that the General Partner of a Partnership Debtor or any other person whose assets, properties and personal estates are not subject to administration in a bankruptcy proceeding for the benefit of his creditors shall not be released or discharged from personal liability for debts by any Bankruptcy Court (*Local Loan Co. v. Hunt,* 292 U.S. 234, 244, 54 S.Ct. 695, 699 (1934)).

3. The opinion of the Supreme Court of California conflicts with the standards formulated in the opinions of this Court for application of *res judicata* or principles of collateral estoppel.

Katchen v. Landy, 382 U.S. 323, 334, 86 S.Ct. 467, 475 (1966) (the normal rules of *res judicata* and collateral estoppel apply to the decisions of bankruptcy courts).

Norton v. Larney, 266 U.S. 511, 517, 45 S.Ct. 146, 148 (1945) (the principle of *res judicata* does not apply to points which come under consideration only collaterally or incidentally).

Ash Sheep Co. v. United States, 252 U.S. 159, 170, 40 S.Ct. 241, 244 (1920) (a judgment is not conclusive of any question which, from the nature of the case or the form of action, could not have been adjudicated in the case in which it was rendered).

Restatement of the Law on Judgments, §71, states:

"When a court has incidentally determined a matter which it would have had no jurisdiction to determine in an action brought directly to determine it, the judgment is not conclusive in a subsequent action to determine the matter directly."

On the scope of a Bankruptcy Court's jurisdiction under the Bankruptcy Act and the application of principles of *res judicata* to the orders of Bankruptcy Judges, Collier states:

"In order that the referee's order be res judicata as to a later suit, it must be shown that either the matter controverted in the second action was raised and litigated in the first one, or that the matter, if not raised, was one which appropriately might have been brought forward and litigated." (2A *Collier on Bankruptcy,* ¶38.02 at 1400).

Southern Pac. R. Co. v. United States, 168 U.S. 1, 48-49, 18 S.Ct. 18, 27 (1897) (principles of collateral estoppel apply when a right, question or fact has been distinctly put in issue and directly determined by a court of competent jurisdiction). *Accord, Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573, 592-593, 94 S.Ct. 806, 819 (1974).

National Exchange Bank of Tiffin v. Willy, 195 U.S. 257, 263, 25 S.Ct. 70, 72 (1904) (the effect of every judgment depends upon the power of the court to render the judgment).

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 333, 91 S.Ct. 1434, 1445 (1971) (the party against whom a plea of *res judicata* is asserted must have had a full and fair opportunity procedurally, substantively and evidentially to pursue his claim the first time).

Under the circumstances presented in this case the observation of this Court in *Gratiot County State Bank v. Johnson,* 249 U.S. at 250, 39 S.Ct. at 264, is particularly significant:

> "Furthermore, to require every creditor to acquaint himself with the issues raised in every proceeding in bankruptcy against [General Partners of a Partnership] debtor, in order to determine whether a decision on any such issue might conceivably affect his interest, and, if so, either to participate in the [proceeding] or, at his peril, suffer the decision on every question therein [determined] to become res judicata against him, would be an intolerable hardship upon creditors."

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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By STEPHEN D. DRUSHALL,
Attorneys for Petitioner.

APPENDIX A.

Opinion of the Supreme Court of the State of California.

In the Supreme Court of the State of California.

Charles L. Levy, Plaintiff and Respondent, v. Irving J. Cohen et al., Defendants and Appellants. L.A. 30701, Super. Ct. No. C 45298.

Filed: March 17, 1977.

BY THE COURT*

In this action brought against the general partners of a limited partnership to recover on promissory notes executed by them on behalf of the partnership, defendants appeal from a judgment entered after a nonjury trial in favor of plaintiff and against defendants in the sum of $25,000 together with interest and attorney fees.

After decision by the Court of Appeal, Second Appellate District, Division Four, reversing the judgment on the ground that recovery was precluded by the defense of res judicata, we granted a hearing in this court for the purpose of giving further consideration to the issues raised. Having made a thorough examination of the cause, we have concluded that the opinion of the Court of Appeal prepared by Justice Dunn and concurred in by Acting Presiding Justice Kingsley and Justice Jefferson correctly treats and disposes of the issues involved and we adopt such opinion as

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*Before Tobriner, Acting C.J., Mosk, J., Clark, J., Richardson, J., Sullivan, J.,** and Taylor, J.***

**Retired Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

***Assigned by the Chairman of the Judicial Council.

and for the opinion of this court. Such opinion (with appropriate deletions and additions) is as follows:*

On December 11, 1972, plaintiff filed an action against Beverly Crest Convalescent Hospital, a limited partnership, and against Cohen, Moshein and Zide, individually and as general partners of the limited partnership defendant. Plaintiff sought payment of two promissory notes of the partnership (executed in its behalf [] [by] defendants Cohen and Moshein, as general partners) in the total principal sum of $25,-000, plus interest.[1] The complaint alleged, inter alia: on October 30, 1972,[2] in the United States District Court, Central District of California, the limited partnership filed a proceeding for a real property arrangement under the Bankruptcy Act; in that proceeding, which allegedly was then pending, plaintiff was listed as an unsecured creditor of the limited partnership, having a claim against the partnership for $25,000.

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*Brackets together, in this manner [] *without enclosing material,* are used to indicate deletions from the opinion of the Court of Appeal; brackets *enclosing material* (other than editor's added parallel citations) are, unless otherwise indicated, used to denote insertions or additions by this court. We thus avoid the extension of quotation marks within quotation marks, which would be incident to the use of such conventional punctuation, and at the same time accurately indicate the matter quoted. In so doing, we adhere to a method of adoption employed by us in the past. (See Chicago Title Ins. Co. v. Great Western Financial Corp. (1968) 69 Cal.2d 305, 311, fn. 2 [70 Cal. Rptr. 849, 444 P.2d 481], and cases there cited.)

[1]The complaint contained a second cause of action (breach of a written contract of employment). The trial court determined, as a conclusion of law, that plaintiff was not entitled to recover on that count. Plaintiff has not cross-appealed from the judgment insofar as it denied relief on the second cause of action.

[2]According to the findings of fact, the correct date is October 30, 1970.

Defendants answered the complaint.[3] In a supplement (filed July 31, 1974) to his answer, defendant Cohen alleged, as an affirmative defense: on July 3, 1973, an order confirming a plan of arrangement was entered in the proceeding for real property arrangement filed on behalf of the limited partnership; that order, which became final, provided that defendants Cohen, Moshein and Zide were released from all debts, liabilities and obligations incurred by them on behalf of the limited partnership.[4]

The action was tried by the court. Findings of fact and conclusions of law were signed and filed. Among the facts found were the following: the limited partnership, Beverly Crest Convalescent Hospital was formed December 31, 1965; at all times subsequent to that date, defendants Cohen and Moshein have been general partners of Beverly Crest Convalescent Hospital; since November-December 1968, defendant Zide has been a general partner of Beverly Crest Convalescent Hospital; on December 20, 1967, plaintiff became a limited partner of Beverly Crest Convalescent Hospital; on January 23, 1968, he loaned $15,000 to the limited

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[3]At the commencement of the trial, plaintiff's attorney told the court that defendant Beverly Crest Convalescent Hospital "was not served with process, and is not a party to this proceeding." We are at a loss to understand this statement because an answer was filed on behalf of Beverly Crest Convalescent Hospital, and the record furnished to us does not indicate that plaintiff dismissed the action as to such defendant. At any rate the apparent discrepancy is immaterial here, for the judgment does not run against Beverly Crest Convalescent Hospital, and it is not a party to this appeal.

[4]Defendant Cohen filed a cross-complaint against plaintiff for money. Judgment was entered in favor of Cohen, and against plaintiff, on the cross-complaint. Plaintiff does not cross-appeal from that portion of the judgment.

partnership; on that date the partnership, by defendant Cohen, a general partner, executed and delivered to plaintiff a promissory note for $15,000 payable February 22, 1968; on February 2, 1968, plaintiff loaned an additional $15,000 to the limited partnership; this loan was evidenced by a promissory note for $15,000 executed on February 2, 1968, by defendant Cohen on behalf of the limited partnership, and payable March 2, 1968; during the period from the spring of 1968 to December 31, 1968, Beverly Crest Convalescent Hospital, by defendants Cohen and Moshein, general partners, for a valuable consideration executed two promissory notes payable to plaintiff: (1) a note dated January 23, 1968, in the principal sum of $15,000, payable two years from date, received in evidence as exhibit 1; and (2) a note dated February 2, 1968, in the principal sum of $10,000, payable two years from date, received in evidence as exhibit 2; neither of these two notes was truly dated, and neither was delivered to plaintiff until on or after December 31, 1968; interest payments made to plaintiff on all promissory notes totaled $4,766.44; on September 9, 1970, a written demand for payment of all debts which Beverly Crest Convalescent Hospital owed plaintiff was mailed to appellants and each received a copy of it; on October 30, 1970, in the United States District Court, Central District of California, a proceeding for a real property arrangement under chapter XII of the Bankruptcy Act was filed on behalf of debtor Beverly Crest Convalescent Hospital; on the same date, in the same court, a proceeding for an arrangement under chapter XI of the Bankruptcy Act was filed on behalf of debtor Beverly Crest Convalescent Hospital, Inc., a California corporation; the two proceedings were consolidated for administrative purposes; when the chapter XII proceeding was filed, the promissory notes exhibits 1 and 2 represented valid and enforceable obligations against Beverly Crest Convalescent Hospital; plaintiff was an unsecured creditor of Beverly Crest Convalescent Hospital for the combined principal sum ($25,000) of such notes, and he was listed as an unsecured creditor for such sum on a schedule to the petition filed in the chapter XII proceeding; when that proceeding was filed, and at all times thereafter, defendants Cohen, Moshein and Zide, as general partners of Beverly Crest Convalescent Hospital, were jointly and personally liable to plaintiff for the debts and obligations of Beverly Crest Convalescent Hospital owed to plaintiff; in the chapter XII proceeding, however, Cohen, Moshein and Zide were not debtors; the debtor in that proceeding was the limited partnership, Beverly Crest Convalescent Hospital; on May 15, 1973, a plan of arrangement was filed in the consolidated proceeding; the indebtedness of Beverly Crest Convalescent Hospital to plaintiff was a claim provable in the consolidated proceeding; a proof of claim filed by plaintiff in the chapter XII proceeding was filed late; therefore, plaintiff will not receive any distribution or dividend in the consolidated proceeding; the joint and personal liability of defendants Cohen, Moshein and Zide as general partners of Beverly Crest Convalescent Hospital for its debts and obligations owed to plaintiff was not litigated in the consolidated proceeding; on June 26, 1973, a meeting of creditors was held before a bankruptcy judge to consider the plan of arrangement filed in the consolidated proceeding; notice of such meeting was mailed to all creditors appearing on the list of creditors of

the debtors; an order confirming plan of arrangement was filed in the consolidated proceeding on July 3, 1973; that order discharged the limited partnership from all debts and liabilities owed to plaintiff; (the order further provided: "Upon the entry of this Order, the aforesaid Drs. Harry Zide, Irving J. Cohen and Jack Moshein are released and discharged from any and all debts, liabilities and obligations whatsoever incurred in connection with the operation, construction or maintenance of the business, properties and assets of the Debtors herein, as well as from the conduct of the business operations and activities of said Debtors, and the Order shall be and constitute a defense to the assertion of any such claims and evidence of the discharge thereof"); for purposes of the present action, the record upon which the order confirming plan of arrangement is based is the plan of arrangement filed May 15, 1973, in the consolidated proceeding; the order confirming plan of arrangement is broader than the record upon which it is based insofar as such order purports to release and discharge defendants Cohen, Moshein and Zide, as general partners of Beverly Crest Convalescent Hospital, from their joint and personal liability to plaintiff for the debts and obligations of Beverly Crest Convalescent Hospital owed to plaintiff at the time the chapter XII proceeding was filed; the promissory notes exhibits 1 and 2 became due and payable on January 23, 1970, and February 2, 1970, respectively; defendants Cohen, Moshein and Zide, and each of them, are indebted to plaintiff in the principal sum of $25,000, plus interest at 8¼ percent per annum for a period of 7¼ years in the sum of $14,952.55, less credit for total payments made to plaintiff in the sum of $4,766.44.

As conclusions of law, the court determined: the bankruptcy court in the consolidated proceeding did not have jurisdiction over plaintiff with regard to his claim against defendants Cohen, Moshein and Zide, as general partners of Beverly Crest Convalescent Hospital, to enforce said defendants' personal liability for the debts and obligations of Beverly Crest Convalescent Hospital; "[f]or purposes of the matters at issue in this action only, the Order Confirming Plan of Arrangement filed on July 3, 1973, in the Consolidated Proceeding, is deemed without res judicata effect."

Judgment was entered in favor of plaintiff, and against defendants Cohen, Moshein and Zide, in the principal sum of $25,000, plus interest thereon in the sum of $10,186.11, for a total of $35,186.11, plus $2,381 as attorneys' fees.

Defendants contend the judgment must be reversed because the order of the bankruptcy court, releasing defendants from liability for obligations of the limited partnership, was res judicata on the issue of defendants' liability on the promissory notes which are the subject of the present action.

The doctrine of res judicata precludes parties or their privies from relitigating an issue that has been finally determined by a court of competent jurisdiction. (Dillard v. McKnight (1949) 34 Cal.2d 209, 213.) "Any issue necessarily decided in such litigation is conclusively determined as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action." (Bernhard v. Bank of America (1942) 19 Cal.2d 807, 810). The application of the doctrine in a given case depends upon an affirmative answer to these three questions: (1) Was the issue decided

in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party to or in privity with a party to the prior adjudication? (Bernhard v. Bank of America, *supra,* at p. 813. See also Blonder-Tongue v. University Foundation (1971) 402 U.S. 313, 323-324.) Each of the foregoing requirements is met here:

1. The present action seeks to enforce defendants' liability for an obligation of the limited partnership, a liability which was ordered extinguished by the order confirming plan of arrangement entered in the bankruptcy proceeding.

2. An arrangement confirmed by a bankruptcy court has the effect of a judgment rendered by a federal district court. (Miller v. Meinhard-Commercial Corp. (5th Cir. 1972) 462 F.2d 358, 360.) The federal rule is that a judgment or order, once rendered, is final for purposes of res judicata until reversed on appeal or modified or set aside in the court of rendition. (Stoll v. Gottlieb (1938) 305 U.S. 165, 170-171; Martin v. Martin (1970) 2 Cal.3d 752, 761.) The record does not indicate that the order confirming plan of arrangement was reversed, modified or set aside. Hence, that order is final.

3. Proceedings in bankruptcy are proceedings *in rem* and all persons concerned, including creditors, are deemed to be parties to the proceedings. (Chappel v. First Trust Co. of Appleton, Wis. (E.D. Wis. 1940) 30 F.Supp. 765, 766. See also 11 U.S.C. §§ 767(1), 873(1).)[5] As an unsecured creditor of the limited

[5]Section 767 (pertaining to a chapter XI proceeding) and section 873 (pertaining to a chapter XII proceeding) both provide, in pertinent part: "Upon confirmation of an arrangement —[¶] (1) the arrangement and its provisions shall be binding upon the debtor . . . and upon all creditors of the debtor, whether or not they are affected by the arrangement or have accepted it or have filed their claims, and whether or not their claims have been scheduled or allowed and are allowable. . . ."

partnership, plaintiff (against whom the plea of res judicata is here asserted) was a party to the consolidated proceeding in the bankruptcy court.

Although the requirements for application of res judicata are met in the present case, plaintiff contends the doctrine nevertheless is inapplicable here because, under section 5(j) of the Bankruptcy Act (11 U.S.C. § 23(j)),[6] the bankruptcy court was without jurisdiction to discharge the liability of defendants for the obligations of the limited partnership.

Full faith and credit must be given to a final order or judgment of a federal court. (Code Civ. Proc., § 1908; In re Bailleaux (1956) 47 Cal.2d 258, 260, disapproved on other grounds in In re Russell (1974) 12 Cal.3d 229, 235; Mueller v. Elba Oil Co. (1942) 21 Cal.2d 188, 205.) Such an order or judgment has the same effect in the courts of this state as it would have in a federal court. (In re Bailleaux, *supra,* 47 Cal.2d at p. 260; Bank of America v. McLaughlin etc. Co. (1940) 40 Cal.App.2d 620, 626.) In the federal jurisdiction, the doctrine of res judicata prevents the readjudication of all matters (including jurisdiction) which were, or might have been, liti-

[6]Title 11 United States Code section 23: "(j) The discharge of a partnership shall not discharge the individual general partners thereof from the partnership debts. . . ."

This provision applies to proceedings under chapter XII of the Bankruptcy Act. (11 U.S.C. § 802; Acme Tool, Inc. v. Flesher (10th Cir. 1962) 309 F.2d 636, 637.)

gated in a prior proceeding between the same parties. (See Chicot County Dist. v. Bank (1940) 308 U.S. 371; Stoll v. Gottlieb, *supra,* 305 U.S. 165; Brown v. United States (3d Cir. 1974) 508 F.2d 618, 630-631; Miller v. Meinhard-Commercial Corp., *supra,* 462 F.2d at pp. 360-361.)

Here, the trial court found, as a fact, that the question of defendants' liability for the debts and obligations of the limited partnership owed to plaintiff was not litigated in the bankruptcy proceeding. Nevertheless, if plaintiff had an opportunity to litigate such question in that proceeding, his failure to do so would not eliminate, in the present action, the conclusive effect of the bankruptcy court's determination that defendants are not liable for debts of the limited partnership.

Illustrative of this aspect of the doctrine of res judicata is Chicot County Dist. v. Bank, *supra,* 308 U.S. [371]. There, respondents brought suit in a United States District Court to recover on bonds issued by petitioner. In its answer, petitioner pleaded as res judicata a decree of the same district court, sitting as a bankruptcy court, rendered in a proceeding instituted by petitioner for a readjustment of its indebtedness. That decree canceled the bonds and enjoined the holders from thereafter asserting any claim thereon. The United States Supreme Court sustained the plea of res judicata even though the statute under which the bankruptcy court had acted was subsequently declared unconstitutional. In this regard, the court stated: "If the general principles governing the defense of *res judicata* are applicable, these bondholders, having the opportunity to raise the question of invalidity, were not the less bound by the decree because they failed

to raise it. . . . Whatever the contention as to jurisdiction may be, whether it is that the boundaries of a valid statute have been transgressed, or that the statute itself is invalid, the question of jurisdiction is still one for judicial determination. . . . As the question of validity was one which had to be determined by a judicial decision, if determined at all, no reason appears why it should not be regarded as determinable by the District Court like any other question affecting its jurisdiction. There can be no doubt that if the question of the constitutionality of the statute had actually been raised and decided by the District Court in the proceeding to effect a plan of debt readjustment in accordance with the statute, that determination would have been final save as it was open to direct review upon appeal. Stoll v. Gottlieb . . . [305 U.S. 165]. [¶] The remaining question is simply whether respondents having failed to raise the question in the proceeding to which they were parties and in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled principle that *res judicata* may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end.' " (308 U.S. at pp. 375, 377-378.)

In the present action the findings establish: on May 25, 1973, plaintiff, as an unsecured creditor of the limited partnership, was given notice of the meeting of creditors (held June 26, 1973) which resulted in the order confirming plan of arrangement. "Under *Chicot County* the crucial element that would bar collateral

attack on a judgment seems to be whether the party was afforded an opportunity to litigate." (Brown v. United States, *supra,* 508 F.2d at p. 631.) Plaintiff here had notice of the meeting of creditors and he does not suggest that he was denied an opportunity, at such meeting, to raise his objection that the bankruptcy court lacked jurisdiction to discharge defendants from liability for the obligations of the limited partnership. Since the objection could have been raised in the bankruptcy proceeding, the order confirming plan of arrangement is conclusive in the present action insofar as such order determined that defendants are not liable for obligations of the limited partnership.

In view of this conclusion, it is unnecessary to consider other points raised by defendants.

[] [The judgment is reversed.]

Supreme Court, U. S.
FILED
SEP 2 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977
No. 76-1787

CHARLES L. LEVY,

Petitioner,

vs.

IRVING J. COHEN, JACK MOSHEIN and HARRY A. ZIDE,

Respondents.

Response of Respondents in Opposition to Petitioner's Petition for Writ of Certiorari to the Supreme Court of California.

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I.

Questions Presented.

Charles L. Levy, Plaintiff-Petitioner, has filed a Petition for Writ of Certiorari to the Supreme Court of California contending that he had the right to make a collateral attack in the California State Court upon an order (Judgment) (which became final) confirming the plan of arrangement entered by a Bankruptcy Court in a Federal District Court in a Chapter XII proceeding of a limited partnership which discharged the general partners (being the three (3) defendants-respondents in this matter) from personal liability for partnership debts.

Petitioner's contention is that the Bankruptcy Court did not have jurisdiction to make such Order.

II.
Statements of the Case.

The statements of the case set out in Petitioner's Petition should be supplemented by the following facts:

1. The Plaintiff-Petitioner made the loans, which were the subject of his action in the Los Angeles Superior Court to the limited partnership in January and February of 1968.

2. From a time prior to the making of the aforementioned loans the Plaintiff-Petitioner was and still is a limited partner of Beverly Crest Convalescent Hospital, a California limited partnership, of which the three Defendants-Respondents are the General Partners.

3. From November 1970, which was one month after the proceeding for a real property arrangement under Chapter XII of the Federal Bankruptcy Act was commenced by the Beverly Crest Convalescent Hospital (hereinafter referred to as the "partnership"), the Plaintiff-Petitioner was employed by the Trustee-Receiver in bankruptcy having jurisdiction over the said bankruptcy proceeding and was so employed until November 1973. This was four (4) months after the Order was signed and filed by the Bankruptcy Judge and which Order exonerated the Defendants-Respondents from the liabilities of the limited partnership.

4. The duties of the Petitioner-Plaintiff for the Receiver-Trustee were (using his own testimony):

"Assisting the receiver-trustee in managing, conserving and overseeing the facilities and equipment located therein; performing public relations services and meeting with interested groups on refinancing or purchasing the hospital facilities."

5. The Plaintiff-Petitioner Charles L. Levy was named as an unsecured general creditor on schedule A-3 of the application for bankruptcy filed by the limited partnership and signed by the three (3) General Partners (Respondents herein).

6. Subsequently, the Plaintiff-Petitioner filed a proof of claim in bankruptcy (dated June 12, 1973) but filed *after* May 13, 1974 and on August 6, 1974 the attorneys for the Plaintiff-Petitioner received a letter from the attorneys for the Trustee in Bankruptcy stating that the claim filed on behalf of Charles L. Levy was late filed and barred because the last date to file claims was May 13, 1974.

7. The counsel for the Plaintiff-Petitioner stated to the State Trial Court "I further represent to the Court my firm specializes in insolvency (Bankruptcy Proceedings). I have read the plan of arrangement. This is what is sent to the unsecured creditors."

8. The record of the said Bankruptcy Court showed that a meeting of creditors was held before John E. Bergener, Bankruptcy Judge, on June 26, 1973 to consider the plan of arrangement filed on May 15, 1973; the notice of such meeting was mailed to all creditors and that an order confirming the said plan of arrangement was signed and filed on July 3, 1973.

9. The three (3) Defendants-Respondents did act throughout the Bankruptcy proceedings as the General Partners of the said Limited Partnership and did sign as said General Partners the plan of arrangement which was followed by the Order confirming the plan of arrangement. They were both General and Limited Partners and collectively owned 49% of the Limited Partnership.

10. On July 17, 1974 the Defendant-Respondent Irving J. Cohen, D.D.S., filed and served on counsel for the Petitioner a Notice of Motion to Supplement the Answer of Dr. Irving J. Cohen by adding as an affirmative defense to his Answer to Complaint in the State Court the order of the Bankruptcy Court exonerating him and the other two (2) General Partners as such General Partners from the liabilities of the limited partnership.

The motion to file such supplement to the answer to the complaint was heard on July 31, 1974 in the Los Angeles Superior Court. There was no opposition of any kind to such motion by the Plaintiff-Petitioner. The motion was granted at that time. In addition, there was no demurrer or other Pleadings filed afterwards by the Plaintiff-Petitioner to such supplemental answer making any attack whatsoever on the additional affirmative defense.

11. The proposed plan of arrangement set out "Confirmation of the plan of arrangement shall be deemed a full and complete release and settlement in full of any and all claims provable under the provision of the Bankruptcy Act against:

i. Beverly Crest Convalescent Hospital, a California corporation;

ii. Beverly Crest Convalescent Hospital, a California Limited Partnership;

iii. Harry A. Zide, Irving J. Cohen and Jack Moshein.

12. The Plan of Arrangement provided for a sale of the hospital facilities of the Limited Partnership to two individuals.

The Plan stated that the three General Partners (Respondents herein) have substantial claims estimated to approximate $500,000.00 which, for the purposes of the plan only, were to be subordinated to payment of claims of all other general unsecured creditors.

13. The order confirming the plan of arrangement set out that it had been accepted by an appropriate number of creditors holding an aggregate amount of claims required to approve said plan pursuant to the provisions of the Bankruptcy Act and also set out that upon the entry of the Order, Drs. Harry A. Zide, Irving J. Cohen and Jack Moshein were released and discharged from any and all debts, liabilities and obligations whatsoever incurred in connection with the operations, construction and maintenance of the business, properties and assets of the debtors herein as well as from the conduct of the business operations and activities of said debtors and that the Order shall be and constitute a defense as to the assertion of any such claims and evidence of the discharge thereof.

The order was signed and filed on July 3, 1973 and no attack of any kind having been made on such order it became final.

14. The indebtedness of the limited partnership owed to the Plaintiff-Petitioner as of the filing of the Chapter XII proceeding was a claim provable against the Limited Partnership.

15. The official records of the Bankruptcy Judge having jurisdiction over the bankruptcy proceedings contained a statement that a clerk in his office had mailed a true copy of the notice of meeting (to be held June 26, 1973) to all creditors as they appeared in the list of creditors of the said bankrupt-debtor; that

the record of the said Bankruptcy Court further showed that a meeting of creditors was held before the Bankruptcy Judge on June 26, 1973 to consider the plan of arrangement filed in the proceeding on May 15, 1973 and that notice of such meeting was mailed to all creditors.

III.

Arguments.

1. The Plaintiff-Petitioner Charles L. Levy cannot make a collateral attack on a judgment of the Federal Court which has become final.

2. The Plaintiff-Petitioner is doing what the decisions of the Supreme Court of the State of California and the Supreme Court of the United States of America have ruled one cannot do—that is, one cannot make a collateral attack upon a judgment of a Federal Court which has become final in which the Plaintiff-Petitioner failed to raise the question as to the lack of jurisdiction of the Bankruptcy Judge to make the Order in the Bankruptcy proceeding to which he was a party and in which proceeding he could have raised such a question with the right of review to the Federal District Judge and the right of appeal from the latter's decision if adverse to him.

3. If the Plaintiff-Petitioner had gone to the Bankruptcy Court and contended that the Court had no jurisdiction to make such Order and that the three (3) General Partners should not be exonerated from the debts of the Limited Partnership then the three (3) General Partners would have become indispensable and necessary parties to such action by the Plaintiff-Petitioner and would have necessarily become litigants in such action.

4. However, the Plaintiff-Petitioner chose, for some unknown reason, to avoid the forum of the Federal District Court and sought to make a collateral attack upon the Order of the Bankruptcy Court in the State Court contending that the Bankruptcy Court lacked jurisdiction to make such an Order.

5. Section 367 (371) of the Bankruptcy Act provides for the effect of a confirmation as follows:

> *"The arrangement and its provisions shall be binding upon the debtors,* upon any person issuing securities or acquiring property under the arrangement *and upon all creditors of the debtor,* whether or not they are affected by the arrangement or *have accepted it or have filed their claims,* and whether or not their claims have been scheduled or allowed and are allowable" . . . (Emphasis added).

6. In the case of *Martin v. Martin* (1970) 2 Cal.3d 752 at 759, 761-763 the Court held as follows:

> "Under Section 39 (c) (11 U.S.C. § 67 (c)) any person aggrieved by an Order of a Referee may challenge the Order by a Writ of Review if timely made. A Referee's Orders, even when acting in a judicial capacity and as the Court, are subject to review by the Judge upon timely application to that end; but they are res judicata unless upset on review and no more subject to collateral attack than judgments and decrees generally. (2 Remington on Bankruptcy (1956) § 619, p. 78; also, 2 Collier on Bankruptcy (14th Ed. 1969) § 38.02, pp. 1397-1400).
>
> A Federal Court judgment has the same effect in the Courts of California as it would in a Federal Court.

The Federal rule is that a judgment or Order, once rendered, is final unless reversed on appeal or modified or set aside in the Court of rendition. It may not be collaterally attacked in another Court forum.

Even if the Bankruptcy Court erred in its interpretation of the agreement an erroneous judgment is as conclusive as a correct one." (Emphasis added).

Citing *Panos v. Great*, 21 Cal.2d 636 at 640.

IV.
Applicable Law.

It is difficult to augment the decision of the Supreme Court of California on this matter.

The opinion sets out the pertinent facts, the principles of law involved and the case law applicable to such facts and principles.

The entire basis of the Petitioner's argument is that the Bankruptcy Court lacked jurisdiction to enter the Order which it did and that the Petitioner had the right to make a collateral attack upon such Order in another forum.

There are two recent Federal Circuit Court of Appeals decisions bearing on this point.

In the case of *Lubben v. S.S.S.*, 453 F.2d 645, (First Circuit 1972) the Court stated:

> "A void Judgment is to be distinguished from an erroneous one, in that the latter is subject only to direct attack.
>
> A Court has the power to determine its own jurisdiction and an error in that determination will not render the Judgment void.

> Since that determination could have been attacked in an appeal it is now res judicata and immune from collateral attack."

In another case, *In re Trimble Co.*, 479 F.2d 103 (Third Circuit 1973), that Court stated:

> "Even if the Court erred in its assumption that it had jurisdiction, the judgment would not be void but only in error and therefore, if not challenged on appeal, it would become final and immune from collateral attack."
>
> Citing—*Stoll v. Gottlieb*, 305 U.S. 165, 59 S.Ct. 317 (1940).

The case of *Duke v. Durfee*, 375 U.S. 106, 845 S.Ct. 242 (1963) states "a judgment is entitled to full faith and credit—even as to questions of jurisdiction".

V.
Conclusion.

We have here a situation where a Limited Partner of a Limited Partnership filed an action in a State Court for loans made to the Limited Partnership suing the three General Partners on the principle they were responsible for the debts of the Limited Partnership which, at the time of the commencement of the suit, was in a Chapter XII Bankruptcy Proceeding in the local Federal District Court.

Soon after the Bankruptcy Proceedings were commenced and until four months after the Order being attacked was entered the Plaintiff-Petitioner was employed by the Receiver-Trustee in Bankruptcy for the Limited Partnership.

During the Trial in the State Court, counsel for the Plaintiff-Petitioner stated to the Trial Court that his firm specialized in insolvency, and that he had read the plan of arrangement.

The Plaintiff-Petitioner was listed as a general unsecured creditor in the Bankruptcy Proceedings and he received notices of the proceedings in the Bankruptcy Proceedings. He filed a claim in the proceedings but it was filed too late.

He had ample opportunity to object to the plan of arrangement and the Order confirming such plan. He had the same opportunity to object to the Order being added as an additional affirmative defense to the answer to complaint of one of the Respondents (Defendant in the State Court action).

Defendants-Respondents respectfully submit that the opinion of the Supreme Court of California in the present action is a correct one and follows decisions of the Supreme Court of the United States and of the Supreme Court of California and that the negligence of the Plaintiff-Petitioner in failing to assert his contentions in the Federal Bankruptcy Court when he had ample opportunity to raise such contentions did not give him the right to re-litigate those issues in the State Courts.

As the Supreme Court of California concluded in its decision:

> "Plaintiff-Petitioner here had notice of the meeting of creditors and he does not suggest that he was denied an opportunity, at such meeting, to raise his objections that the Bankruptcy Court lacked jurisdiction to discharge defendants (Respondents) from liability for the obligations of

> the Limited Partnership. Since the objection could have been raised in the Bankruptcy proceeding, the order confirming the plan of arrangement is conclusive in the present action insofar as such Order determined that Defendants (Respondents) are not liable for obligations of the Limited Partnership".

It is, therefore, respectfully submitted by the Defendants-Respondents that the Petition of the Plaintiff-Petitioner for a Writ of Certiorari to the Supreme Court of California be denied.

Dated: September 1, 1977, Los Angeles, California.

Respectfully submitted,

DAVID A. MATLIN,
Attorney for Defendants-Respondents.